ZANORAIN ABDUL LATIF

v.

PUBLIC PROSECUTOR

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
ABU MANSOR ALI JCA
HAIDAR MOHD NOOR JCA
[CRIMINAL APPEAL NO: B-05-109 OF 1995]
12 MAY 1998

CRIMINAL PROCEDURE: *Jury - Finding of - Majority finding of guilt - Absence of recording of concurrence - Whether concurrence can be inferred - Whether such absence renders verdict a nullity - Criminal Procedure Code, s. 231*

CRIMINAL PROCEDURE: *Jury - Finding of - Distinction between unanimous verdict and majority verdict*

WORDS & PHRASES: *"... if the court concurs ..." - Criminal Procedure Code, s. 231*

The appellant, Zanorain, was found guilty by a majority verdict in a jury trial. The judicial commissioner entered judgment without recording his concurrence. Counsel for the appellant argued that the trial judge had erred when he failed to record his concurrence as s. 231 of the Criminal Procedure Code ('CPC') makes it mandatory to do so. The prosecution however contended that as the trial judge had immediately entered judgment, his concurrence could be inferred. He further submitted that the aforesaid section does not expressly state that such concurrence or otherwise should be recorded. He drew an analogy to ss. 197 and 198 of the CPC where a judge is specifically required to make such a record.

Held:
Per Shaik Daud Ismail JCA

[1] Section 211(1) of the CPC empowers the court, if it thinks fit, to proceed with the trial if one member of the jury for any sufficient cause is prevented from attending throughout the trial, provided that the members of the jury shall not fall below six.

[2] Nowhere in s. 231 of the CPC is it mentioned that the concurrence or otherwise of the court ought to be recorded. However, without recording it, there is no way the court can signify its concurrence or otherwise of the majority verdict.

[3] Where a plea of not guilty is found by the jury, either unanimously or by a majority, the judge, by virtue of s. 229 of the CPC, must record a judgment of acquittal, as the question of concurrence or otherwise does not arise.

[4] In light of the vital distinction between a unanimous verdict and a majority verdict, the phrase "… if the court concurs …" in s. 231 of the CPC is a significant phrase and it must mean what it says.

[5] The fact that the judicial commissioner entered judgment immediately after the majority verdict did not necessarily mean that he concurred with the majority verdict. It might well be that he felt bound to accept the verdict irrespective of whether he concurred with it or not.

[6] On the true interpretation of s. 231 of the CPC, it was encumbent upon the learned judicial commissioner in this case, not only to express but also to record his concurrence or otherwise of the jury's verdict, more so where in this case the majority verdict was five to one. In this matter, the learned judicial commissioner would be performing the duty of a judge of facts.

[7] Sections 197 and 198 are not analogous to s. 231 as the role of a judge in a trial with the aid of asesssors and that in a trial by jury are vastly different.

[8] It was not sufficient for the learned judicial commissioner to comply with the mandatory provision of the law by inference. Such insufficiency rendered the majority verdict a nullity. A retrial had to be convened before another judge and jury.

[Appealed allowed; conviction quashed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Para juri, secara majoriti, telah mendapati pihak perayu, Zanorain, bersalah. Pesuruhjaya kehakiman telah menurunkan penghakimannya tanpa merekodkan persetujuannya. Peguam untuk pihak perayu membantah bahawa hakim perbicaraan telah melakukan kesilapan bilamana dia gagal untuk merekodkan persetujuannya. Katanya, mengikut s. 231 Kanun Prosedur Jenayah ('KPJ'), adalah mandatori untuk hakim merekodkan persetujuan tersebut. Pihak pendakwa telah mengutarakan oleh kerana hakim perbicaraan telah menurunkan penghakimannya dengan serta-merta, maka persetujuannya boleh diandaikan.

Tambahan pula, hujah beliau, tiada terkandung dalam seksyen tersebut yang persetujuan atau sebaliknya, harus direkodkan. Beliau membuat analogi terhadap ss. 197 dan 198 KPJ di mana seseorang hakim dimestikan menurunkan rekod persetujuannya.

Diputuskan:
Oleh Shaik Daud Ismail HMR

[1] Seksyen 211(1) KPJ memberi kuasa kepada mahkamah untuk meneruskan sesuatu perbicaraan bilamana seorang dari ahli juri tidak dapat menghadiri perbicaraan penuh, tetapi seharusnya bilangan juri tidak boleh kurang dari enam kesemuanya, seperti dalam kes ini.

[2] Walaupun tidak terkandung di mana-mana dalam s. 231 KPJ yang persetujuan atau sebaliknya oleh mahkamah harus direkodkan, namun tanpa rekod ini, mahkamah tidak dapat menunjukkan persetujuannya atau sebaliknya mengenai keputusan majoriti itu.

[3] Di mana pihak juri menyokong akuan tidak bersalah, samada secara sebulat suara atau secara majoriti, hakim dimestikan merekodkan penghakiman mengenai pembebasan tersebut, kerana isu persetujuan atau sebaliknya tidak timbul.

[4] Berpandukan perbezaan penting antara suatu keputusan sebulat suara dan secara majoriti, ungkapan "… if the court concurs …" yang terkandung di dalam s. 231 KPJ amatlah penting dan seharusnya bermaksud apa yang dikatakan dan mendapat status mandatori.

[5] Walaupun pesuruhjaya kehakiman menurunkan penghakimannya dengan segera selepas keputusan majoriti diberi, ini seharusnya tidak bermakna bahawa dia telah bersetuju dengan keputusan tersebut. Ada kemungkinannya beliau terasa terikat untuk menerima keputusan tersebut, tidak kira samada dia sebenarnya setuju atau tidak.

[6] Berpandukan interpretasi sebenar s. 231 KPJ, adalah menjadi beban pesuruhjaya kehakiman dalam kes ini, bukan sahaja untuk mengeluarkan malah harus merekodkan persetujuannya atau sebaliknya mengenai keputusan pihak juri, terutama sekali di mana keputusan majoriti para juri adalah lima lawan satu. Dalam hal ini, pesuruhjaya kehakiman yang bijaksana akan menjalankan tugasnya sebagai hakim fakta-fakta.

[7] Pemakaian ss. 197 dan 198 tidak sama dengan s. 231 oleh kerana tugas hakim dalam sesebuah perbicaraan dengan bantuan pentaksir dan dalam hal yang melibatkan para juri adalah sangat berbeza.

[8] Adalah tidak mencukupi untuk pesuruhjaya kehakiman tersebut mematuhi syarat-syarat mandatori melalui andaian semata-mata. Kekurangan tersebut membuatkan keputusan majoriti suatu pembatalan. Kes ini harus dihadapkan semula di hadapan hakim dan juri yang lain.

[Rayuan dibenarkan; sabitan dibatalkan.]

Cases referred to:
Siew Kam Weng v. Public Prosecutor [1990] 1 CLJ 1 ***(foll)***
Queen v. Chand Bagdee & Ors [1867] 7 WR (cr) 6 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 197, 198, 200, 211(1), 229, 231
Penal Code, s. 302

Other source referred to:
The Criminal Procedure Code, Ratanlal & Dhirajlal, 9th edn, p 284

For the appellant - Karpal Singh; M/s Karpal Singh & Co
For the respondent - Mohd Yusof Hj Zainal Abideen

[Appeal from High Court, Shah Alam; Criminal Trial No: 45-15 of 1994]

Reported by Bhawani Mano

JUDGMENT

Shaik Daud Ismail JCA:

The appellant, Zanorain bin Abdul Latiff @ Aziz, was convicted on 31 October 1995 in the High Court Shah Alam for an offence of murder under s. 302 of the Penal Code, and sentenced to death, after a trial with a jury. We allowed his appeal on 10 February 1998 and ordered a retrial before another judge and jury. Several grounds of appeal were put forward but Mr Karpal Singh, learned counsel for the appellant, intimated that he would proceed only on one ground, namely, that the learned judicial commissioner erred in law in not complying with the mandatory provisions of s. 231 of the Criminal Procedure Code (CPC) when the jury returned a five to one majority verdict of guilty against the appellant. As this ground involves a pure question of law, we feel it would not be necessary for us to dwell on the facts of the case especially so in view of our decision to order a retrial. It might not be amiss to mention in passing that since the amendment to the CPC by Act A 908 with effect from 17 February 1995 which abolished all trials by jury and assessors, the above ground has become academic, but in the present case, as the learned Public Prosecutor has appealed to the Federal Court against our decision we are duty bound to give our reasons thereto.

Since this appeal revolves solely on the interpretation of s. 231 of the CPC, it is relevant, therefore, to examine this particular section. Section 231 of the CPC provides:

> 231. Effect of majority verdict.
>
> If the verdict is guilty by a majority:
>
> (a) if the court concurs in such verdict judgment shall be entered accordingly and the judge shall proceed to pass sentence as prescribed in s. 230;
>
> (b) If the court does not concur in such verdict the accused person shall be tried again before another jury.

The appellant was originally charged before the magistrate on 18 April 1994 and after a preliminary enquiry which concluded on 28 April 1994, was committed to stand trial in the High Court. The trial in the High Court began on 10 October 1995 before a panel of seven members of the jury, pursuant to s. 200 of the CPC. In the course of the trial on 24 October 1995 one member of the jury fell ill and could not continue. As the trial had been postponed earlier to accommodate this particular member of the jury, the learned judicial commissioner thought it fit not to postpone the trial again. He invoked the provisions of s. 211(1) of the CPC and proceeded with the trial with six members of the jury. This section empowers the court, if it thinks fit, to proceed with the trial if one member of the jury for any sufficient cause is prevented from attending throughout the trial, provided that the members of the jury shall not in any case fall below six, as has happened in this case.

The trial proceeded to its conclusion on 31 October 1995, when the six members of the jury returned a five to one verdict against the appellant. Immediately thereupon the learned judicial commissioner convicted the appellant and sentenced him to death, without having recorded his concurrence of the majority verdict pursuant to s. 231 para. (a) of the CPC.

Mr Karpal Singh contented that, pursuant to s. 231 of the CPC, in the case of a majority verdict, there must be concurrence or otherwise by the learned judicial commissioner, a fortiori in this case when the majority verdict was five to one. He contended that since the learned judicial commissioner failed to record his concurrence or otherwise, it has prejudiced the appellant and the verdict is a nullity.

He cited the case of *Siew Kam Weng v. Public Prosecutor* [1990] 1 CLJ 1; [1989] 3 MLJ 479 where the appellant had been tried before a jury of seven on a charge of murder under s. 302 of the Penal Code. At the conclusion of the trial, the jury found him guilty of the lesser offence of culpable homicide

not amounting to murder, by a majority verdict of five to two. The trial judge was unable to concur with the majority verdict and ordered a retrial before another jury. The appellant appealed. In dismissing the appeal the Supreme Court on p. 481 of the report made observations on the distinction between a unanimous and a majority verdict. The court observed thus:

> On the other hand, when the verdict is 'guilty' of whatever offence, the law makes a vital distinction between a unanimous and a majority verdict. If the guilty verdict is unanimous, the trial judge is obliged under s. 230 to accept the plea and proceed to pass sentence. But if the guilty verdict is by a majority of not less than five to two, the law requires the trial judge under s. 231 either to give or withhold his concurrence to such a verdict. In short, such a majority verdict even though by six to one or five to two is not a verdict in law unless and until the trial judge concurs with it. If he does not concur, s. 231(b) comes into operation and the accused must be retried before another jury, for the simple reason that there is a deadlock between the majority of the jury and the judge, and as such there is no verdict in law.
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> The concurrence required by s. 231 of the CPC is a unique provision because it purports to encroach into province of ss. 224(1) and 225 which lay down the rule that the judge determines all questions of law whilst the jury determines all questions of fact. Under s. 231, the trial judge can be said to be performing the duty of a judge of facts taking over, as it were, the function of an additional juror so that when he votes with the majority decision, the verdict of the jury, though not unanimous, is recognised as a verdict in law, but if he votes against it, the verdict becomes abortive.

Therefore, from this observation, it can be seen how important and imperative the concurrence of the judge is, in so far as a majority verdict of the jury is concerned.

The learned Deputy Public Prosecutor argued that since the learned judicial commissioner entered judgment immediately after the verdict, there was, therefore, no necessity for him to record the concurrence. In other words the learned judicial commissioner, by inference, had concurred with the majority verdict. This argument is on the premise that s. 231 of the CPC makes no mention that such concurrence or otherwise should be recorded unlike the provisions in ss. 197 and 198 of the CPC, where in the case of trials with assessors, the learned judge is required to specifically record the opinion of the assessors.

Whilst it is true that nowhere in s. 231 of the CPC is mentioned that the concurrence or otherwise of the court ought to be recorded but we are of the view that without recording it there is no way that the court could signify its concurrence or otherwise of the majority verdict. It is also our view that the

fact that the learned judicial commissioner entered judgment immediately after the majority verdict does not necessarily mean that he concurred with the majority verdict. It may well be that he felt bound to accept the verdict irrespective of whether he concurred with it or not. As in the case of a verdict of 'not guilty' either unanimously or by a majority, the judge, by virtue of s. 229 of the CPC must record judgment of acquittal, as the question of concurrence or otherwise does not arise (see *Siew Kam Seng, supra*).

As for the learned Deputy Public Prosecutor's argument on the analogy in ss. 197 and 198 of the CPC, we find that such argument is misplaced. This is because the role of a judge in a trial with the aid of assessors and that of a trial by jury are vastly different. Therefore, we find no merit in this argument.

In the light of the vital distinction between a unanimous verdict and a majority verdict, we are of the view that the phrase "if the court concurs" in s. 231 of the CPC, is a significant phrase and it must mean what it says and it acquired a mandatory status. We are, however, fortified in the view we took after learned counsel for the appellant referred us to Ratanlal & Dhirajlal The Criminal Procedure Code (Act No. V of 1898) 9th Edn of India in particular to the case of *Queen v. Chand Bagdee & Others* [1867] 7 WR (cr) 6 the headnote of which reads:

> A Sessions Judge ought to record distinctly whether or not he agrees in the verdict of the jury.

The learned author's comment on this case at p. 284 of his book (see p. 33 of IAP) is as follows:

> When the verdict of the jury has been delivered, the judge is bound to say **and record** (emphasis is ours) whether he agrees with the verdict or not.

Therefore, on a true interpretation of s. 231 of the CPC, we held that it is a mandatory provision and as such it is encumbent upon the learned judicial commissioner in this case, not only to express but also to record his concurrence or otherwise of the jury's majority verdict, more so where in this case the majority verdict was five to one. In this case, the learned judicial commissioner would be performing the duty of a judge of facts also (see *Siew Kam Weng's*, case *supra*). We are of the view that it is not sufficient for the learned judicial commissioner to comply with this mandatory provision of the law by inference. In view of the failure to comply with the mandatory provision of the law, we hold that the majority verdict is a nullity.

We allowed the appeal, quashed the conviction and set aside the sentence and ordered a retrial before another judge and jury.